No. 83-1311

In the Supreme Court of the United States

OCTOBER TERM, 1983

DEPARTMENT OF HUMAN SERVICES, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of the decision of the court of appeals that the Department of Defense (DOD) is not required under the Randolph-Sheppard Vending Stand Act (Randolph-Sheppard Act), 20 U.S.C. 107 *et seq.*, to share income from vending machines operated by military exchanges with state agencies that license blind people to operate vending facilities on federal properties.

1. In 1936, in order to provide employment for the blind, Congress passed the Randolph-Sheppard Act, which provides that blind persons may operate vending facilities on federal properties. 20 U.S.C. 107(a). To implement this program, the Secretary of Health, Education, and Welfare[1]

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[1]Prior to 1979, the Secretary of Health, Education and Welfare administered the Randolph-Sheppard Act. In 1979, those functions were transferred to the Secretary of Education. Pub. L. No. 96-88, §§ 301(a)(4)(B) and 507, 93 Stat. 678, 692.

was authorized to designate a state agency to license blind individuals to operate vending facilities at various federal properties within the state. 20 U.S.C. 107a(b).

Because many federal buildings had both blind vendors and vending machines, which compete for business, Congress in 1974 amended the Randolph-Sheppard Act to provide that certain income from vending facilities and machines on federal property should be shared with the state agency that provides for the welfare of blind persons. Pub. L. No. 93-651, § 206, 89 Stat. 2-12, (20 U.S.C. 107d-3(b)). Congress, however, exempted from the Act's coverage "income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by title 10." 20 U.S.C. 107d-3(d). By regulation, DOD has construed this exemption as encompassing "[i]ncome from vending machines operated by or for the military exchanges or ships' stores system." 32 C.F.R. 260.3(i)(3)(i).

2. Petitioner is the agency designated by the Department of Education to implement the Randolph-Sheppard Act in Oklahoma. In 1978, petitioner requested DOD to distribute to it income from vending machines located on the four military bases in Oklahoma. When DOD declined to make any income-sharing payments to petitioner from vending machine income of service exchanges, petitioner filed this suit in the United States District Court for the Western District of Oklahoma, asserting that DOD's refusal to pay was in violation of the Randolph-Sheppard Act.

The district court entered summary judgment for the government (Pet. App. 18a-31a). The court concluded that although the language of 20 U.S.C. 107d-3(d) seemed to support petitioner's claim to all income from vending machines not located within a retail outlet, the legislative history of the military exchange exemption compelled the conclusion that Congress did not intend to require DOD to

share any receipts from vending machines wherever located, so long as they were operated by military post exchanges (Pet. App. 25a-31a).

The court of appeals affirmed (Pet. App. 2a-13a). Like the district court, the court of appeals held that the plainly stated purpose of the statute was to exempt all vending machine sales by post exchanges from the general requirement of income sharing with state agencies (*id.* at 9a-13a).

3. Petitioner's sole contention (Pet. 6-12) is that the courts below erred in interpreting 20 U.S.C. 107d-3(d) as exempting from the general income sharing provision not only income from vending machines actually located inside of an exchange store, but all vending machine income. Both courts, however, properly rejected petitioner's literal reading of the Randolph-Sheppard Act, which is inconsistent with the unambiguous intent of Congress in adopting 20 U.S.C. 107d-3(d). Compare *Trans-Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978).

The legislative history convincingly supports the court of appeals' holding. The income sharing requirements were added to the Randolph-Sheppard Act in 1974 to remedy the *unauthorized* retention of vending machine income by unofficial employee associations. The Comptroller General's reports to Congress, which described the general problem of money from vending machines in federal buildings being diverted from the treasury, consistently distinguished the *authorized* activities of the official military exchanges (Pet. App. 25a-27a). Congress in 1974 decided to use the money from vending machines in federal buildings to assist state agencies, but maintained the distinction drawn by the Comptroller and exempted income from military exchanges. As the Senate Report explained (S. Rep. 93-937, 93d Cong., 2d Sess. 24 (1974)):

> Subsection (d) exempts certain activities from vending machine income assignment. Both military exchange systems and the Veterans Canteen Service operate under specific statutory authority, and are thus, as a matter of policy, excluded. [2]

Any doubt on the issue of Congress's intent regarding the scope of the military exchange exemption was laid to rest in the Brademas-Sikes colloquy, relied upon by the courts below (Pet. App. 10a-13a, 28a-30a), which explicitly states that the exemption covered all machines operated by a military exchange. Representative Brademas was the floor manager of the 1974 amendments in the House. During the debates, Representative Sikes sought clarification regarding the exemption for military exchanges. Representative Sikes asked (120 Cong. Rec. 35712 (1974)):

> I would like the distinguished subcommittee chairman to verify for the record, that this provision exempts from the revenue-sharing plan all those vending machines which are operated by the military post exchanges, Navy exchanges, officer and enlisted messes, and so forth.
>
> * * * * *
>
> Would the gentleman confirm for me the fact that it is the intent that this paragraph shall not apply to the military services, and that this is in keeping with the

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[2]Petitioner seeks to distinguish the statement in the Report by arguing (Pet. 10) that the exchanges do not operate under "specific statutory authority." Although not created by statute, the exchanges do derive authority from statutes charging the service secretaries with responsibility for the welfare and effectiveness of the military. 10 U.S.C. 3012, 5031, 8012. See generally *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

> language on page 24 of the Senate report (S. Rept. No. 93-937) which is more specific on this issue than is the conference report?

Representative Brademas's response is devoid of any ambiguity: "I am pleased to tell the gentleman that the answer to both his questions is 'Yes.' " 120 Cong. Rec. 35712 (1974).[3]

Finally, petitioner's interpretation of the statute would lead to results that are completely contrary to the purpose of the exemption. As Representative Sikes explained, the profits from the vending machines are used by the military to finance various recreational activities for servicemen. If those revenues were shared with the states, the exchange's programs either would be terminated or would have to be funded through DOD appropriations; neither of these options was deemed acceptable by Representative Sikes. 120 Cong. Rec. 35712 (1974). Under petitioner's interpretation, virtually all of the revenue from these vending machines would be shared with state agencies (Pet. App. 10a), thereby eliminating the revenues Congress intended to go to the military exchanges when it adopted 20 U.S.C. 107d-3(d).[4] The court of appeals was thus clearly correct in

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[3]Petitioner argues (Pet. 9-10) that the Brademas-Sikes colloquy deserves little weight because, at one point in the exchange, the exemption was construed more broadly than it is by DOD. The portion of the colloquy upon which the government relies, however, deals explicitly with the issue in this case and is consistent with the policy articulated elsewhere in the legislative history.

[4]Petitioner points out (Pet. 7) that the Department of Education's regulation (34 C.F.R. 395.32(i)) under 20 U.S.C. 107d-3(d) is narrower than DOD's. The conflict does not warrant review by this Court; the inter-agency legal dispute was submitted to the Department of Justice, which resolved it in favor of DOD's interpretation. Despite petitioner's objection, the court of appeals correctly observed that the role played by the Department of Justice was a neutral one (Pet. App. 13a), and therefore the court properly attached some weight to its nonadversarial, administrative interpretation of 20 U.S.C. 107d-3(d).

holding that the reference in 20 U.S.C. 107d-3(d) to "retail sales outlets" should not be interpreted to defeat the obvious intent of Congress in adopting the 1974 amendments.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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